No. 9945

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

VIRGINIA DAVIS HARTMAN and MARGARET DAVIS RICHARDSON,

Appellants,

vs.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Honorable Michael J. Roche, District Judge.

APPELLANTS' OPENING BRIEF.

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Subject Index

Table of Authorities Cited

Cases

Codes and Statutes

Texts

Rules

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JURISDICTION OF THE COURT.

This is an appeal from the final order of the District Court of the United States for the Southern Division of the Northern District of California sustaining the motion to dismiss of the appellee to the second amended complaint filed on behalf of the appellants. (Second Amended Complaint, Tr. 1-45; Motion to Dismiss, Tr. 45-48.)

See Rule 73 of Rules of Civil Procedure for the District Courts of the United States; see Act of March

3, 1891, Secs. 24, 28, 26 Stat. at L. 828; Sec. 128 as amended, Judicial Code; see Act of March 3, 1911, as amended (as to appellate jurisdiction).

STATEMENT OF CASE.

The appellants (plaintiffs in the Court below) filed a second amended complaint to establish a trust and for an accounting against the defendant, Bank of America National Trust & Savings Association, hereinafter referred to as the "defendant Bank" for the sake of brevity, and a number of other defendants as shown by the second amended complaint. It charges facts constituting a rank case of fraud and collusion on the part of the defendant Bank and the other defendants named in the second amended complaint. The defendant, John S. Sinai, an attorney in Reno, Nevada, made a motion to dismiss the original complaint, which was overruled and the case is at issue as to him. Thereafter the defendant Bank and others were made parties defendant as shown by the second amended complaint. The defendant Bank made a motion to dismiss the second amended complaint *as to it,* which was sustained by the judge of the lower Court, from which order this appeal is being prosecuted. No opinion, oral or written, was rendered.

SUMMARY STATEMENT OF APPELLANTS' MAJOR CONTENTIONS.

Briefly stated, the defendant Bank (appellee) contended in support of its motion to dismiss the second amended complaint that it "fails to state a claim upon which relief can be granted as against the said Bank for the following reasons:

First, that the order of the Superior Court of the State of California in and for the County of San Mateo, referred to in said complaint, authorizing the Bank as administrator of the estate of Martina Maxine Dole, deceased, to compromise the claim of the said estate against John S. Sinai, one of the defendants in the said action, is res judicata in favor of the said Bank so far as any claims the said plaintiffs may be asserting by the said complaint against the said Bank are concerned and bars the said action as against the said Bank.

Second, that the decree of final distribution referred to in the said complaint is res judicata in favor of the said Bank so far as any claims the said plaintiffs may be asserting by the said complaint against the said Bank are concerned and bars the said action as against the said Bank.

Third, that the said complaint shows upon its face that any claims the said plaintiffs may be asserting by the said complaint against the said Bank are barred by laches.

Fourth, that the said complaint shows upon its face that any claims the said plaintiffs may be asserting by the said complaint against the said Bank are barred by subdivision 4 of Section 338 of the Code of Civil Procedure of the State of California.

Fifth, that the said complaint shows upon its face that any claims the said plaintiffs may be asserting by the said complaint against the said Bank are barred by section 343 of the Code of Civil Procedure of the State of California." (Tr. 45-47.)

The statement of points (assignments of error) is as follows:

"I.

That the Court erred in sustaining the motion to dismiss of the defendant and appellee, Bank of America National Trust & Savings Association, to plaintiffs and appellants' second amended complaint.

II.

That the Court erred in holding and deciding that the plaintiffs and appellants' second amended complaint did not state a cause of action as against defendant and appellee, Bank of America National Trust & Savings Association." (Tr. 52.)

Amplifying this statement of points, it was contended in the Court below by the defendant Bank that the fraud and collusion alleged against the defendant Bank in procuring, as administrator of the estate of Martina Maxine Dole, deceased, a compromise of the claim of the estate against John S. Sinai, a defendant, a director of the defendant Bank of Reno, Nevada, and one of the attorneys in the said action, for the paltry sum of $5000, whereas the mining property involved is alleged to have been worth $3,000,000, by suppressing the true facts of the compromise and by misrep-

resenting the entire situation to the Probate Court in San Mateo County, California, and committing, through and by itself as administrator and through and by its attorneys, other acts of fraud and collusion, as are specifically set out in the second amended complaint, resulting in the approval by the Court of the compromise and in the subsequent release of the claim against defendant Sinai, constituted *intrinsic* and not *extrinsic* fraud as claimed by the appellants.

Briefly stated, the contention of the appellants on this appeal is that, under the facts set forth in the second amended complaint, the defendant Bank was guilty of *extrinsic* fraud.

As to the second point urged by the defendant Bank, on its motion to dismiss, that the action was barred by laches and by the statute of limitations of the State of California, this was given scant consideration by the lower Court in view of the facts alleged in the second amended complaint and was not seriously pressed by counsel for the Bank in the lower Court.

ARGUMENT.

FIRST POINT.

EXTRINSIC FRAUD.

Taking up the question first as to whether the fraud, collusion and conspiracy alleged against the defendant Bank and the other defendants constitute *extrinsic* fraud, as claimed by the appellants, it was conceded in the Court below that if the facts relied upon as

pleaded in the second amended complaint constitute *intrinsic* fraud the foregoing orders made by the Probate Court in the said estate of Martina Maxine Dole would be *res adjudicata.* If, on the other hand, said facts and circumstances as pleaded in said second amended complaint constitute *extrinsic* fraud, the said aforesaid orders would not be a bar to the present suit.

Do the facts set up in the second amended complaint allege a case of extrinsic fraud against the defendant Bank?

Martina Maxine Dole died in the County of San Mateo, California, on or about February 3, 1934; that at the time of her death she was a resident of the County of San Mateo and left an estate therein consisting of both real and personal property; that she died intestate and left surviving her as her sole heirs at law the plaintiffs, Virginia Davis Hartman, a sister, and Margaret Davis Richardson, another sister, and defendant Harold F. Davis, a brother, and defendant, Arthur A. Dole, her surviving husband. (See paragraph V of second amended complaint; Tr. 3.)

The defendant Bank applied for and was appointed administrator on June 11, 1934, of the estate of said Martina Maxine Dole, deceased, and duly qualified as such; that on November 30, 1936, the Superior Court of the State of California in and for the County of San Mateo, decreed distribution to said heirs at law of the estate of said Martina Maxine Dole and that said estate was distributed to them in accordance with the ratio and proportion of their respective ownership in and to said property belonging to said deceased.

(See paragraph VI of the second amended complaint; Tr. 3-5.)

The defendants, Samuel Platt and John S. Sinai, were and now are attorneys at law engaged in the general practice of the profession of law as co-partners in the City of Reno, State of Nevada, under the firm name and style of Platt and Sinai. (See paragraph IX of second amended complaint; Tr. 6.)

The defendants, C. F. Humphrey and Luther Elkins, were and now are attorneys at law duly licensed as such under the laws of the State of California; that said defendants were the attorneys of record for and represented the defendant Bank as administrator of the estate of Martina Maxine Dole, deceased; that said defendants also were the attorneys for and represented the defendant Arthur A. Dole, husband of said Martina Maxine Dole, and the plaintiffs, Virginia Davis Hartman and Margaret Davis Hartman, heirs of said Martina Maxine Dole in the matter of the estate of said Martina Maxine Dole. (See paragraph X of second amended complaint; Tr. 6-7.)

The defendants, Samuel Platt and John S. Sinai, were, and for a long time previous to the death of said Martina Maxine Dole had been, the attorneys for said Martina Maxine Dole; that by reason of said relationship of attorney and client there existed and had sometime previous to her death existed a relationship of trust and confidence between the said defendants and said Martina Maxine Dole. (See paragraph XI of second amended complaint; Tr. 7.)

On or about May 11, 1933, the defendant Sinai, on behalf of himself and his partner Platt, notified Martina Maxine Dole and her then husband, defendant Arthur A. Dole, substantially as follows:

(a) That the Silverado and Kentucky Mining property, situated in Mono County, California, consisting of a mine, with machinery and other equipment, was advertised for sale and would be sold at a receiver's sale on or about May 20, 1933. (Paragraph XII of second amended complaint; Tr. 7-8.)

(b) That the machinery had cost $300,000 and was then in good condition. (Paragraph XII of second amended complaint; Tr. 8.)

(c) That said defendant Sinai had conferred with his friend, receiver D. C. McKay and that said defendant Sinai was led to believe that by reason of the then prevailing money stringency and consequent lack of available buyers all of said mining property would be sold for about $18,500. (Paragraph XII of second amended complaint; Tr. 8.)

(d) Said defendant Sinai recommended most strongly that the said Martina Maxine Dole could permit said defendants Sinai and Platt to put in a bid at the receiver's sale for and on behalf of said Martina Maxine Dole and that said last named defendants be permitted by said Martina Maxine Dole as her representatives and attorneys to use their best endeavors to purchase all the aforesaid property for the use and benefit of Martina Maxine Dole provided it could be purchased for a sum not to exceed $25,000.

(Paragraph XII of second amended complaint; Tr. 8-9.)

(e) That said defendant Sinai requested said Martina Maxine Dole to send him immediately the sum of $2500 in cash to be used by him in paying a 10% installment of the sale price of said property and further represented that it would not be necessary for said Martina Maxine Dole to send him any additional moneys with which to complete the purchase price of the said property as the said defendant Sinai would be able to obtain the remaining nine tenths of the sale price of the said property from a re-sale of certain of the machinery or certain water rights. (Paragraph XII of second amended complaint; Tr. 9.)

The defendant Sinai, at the time of making the aforesaid representations to Martina Maxine Dole, delivered to her an itemized inventory of the real and personal property above referred to, together with a printed notice of said receiver's sale, together with a letter from Mr. D. C. McKay, the receiver who would make the sale addressed to said defendant Sinai, wherein the said McKay advised Sinai that the purchase of said property would be a very fine investment for said Sinai or any friend or client of his as said machinery on said property alone could be readily sold within a short time after the sale for at least $30,000 cash, which would be about 10% of the original cost of said machinery. (Paragraph XIII of second amended complaint; Tr. 10.)

The machinations of said defendants Sinai and Platt, in inducing Martina Maxine Dole to put up \$2500 in cash for the purchase of the mining property above referred to, are further set forth in Paragraphs XIV, XV and XVI of the second amended complaint. (Tr. 10-13.)

The defendants Sinai and Platt, after purchasing said mining property as the agents, trustees and attorneys of said Martina Maxine Dole in the name of said defendant Sinai at said receiver's sale, in violation of their duty as the agents, trustees and attorneys of said Martina Maxine Dole, to consummate the purchase of said mining property for her account and to make the most favorable arrangement possible for her in obtaining \$16,650 additional, the property having been sold for \$18,500 at receiver's sale, and with intent to defraud the said Martina Maxine Dole out of any profit out of said investment of said mining property other than the return of the said original investment of \$2500 together with a profit thereon of \$500, did the following:

(a) The defendants Sinai and Platt entered into an agreement with one Morse, a machinery man residing in Denver, Colorado, under the terms of which Morse agreed to advance Sinai \$16,650 with which to complete the payment of the sale price of said mining property, all of which was never communicated to the said Martha Maxine Dole by either Sinai or Platt. (Paragraph XVI of second amended complaint; Tr. 14.)

(b) Defendant Sinai agreed to use the moneys he obtained from Morse to complete the payment of the sale price of said property and to have said sale confirmed to the defendant Sinai and then to transfer said mining property to Sierra Consolidated Mines, Inc., a corporation, in consideration of the issuance of certain shares of stock of said corporation fully paid, which shares will be owned by the defendants Sinai and Platt and said Morse in the proportion of one-half to defendants Sinai and Platt and the remaining one-half to said Morse, all of which facts were never communicated to said Martina Maxine Dole by either of the defendants Sinai or Platt. (Paragraph XVII of second amended complaint; Tr. 14-15.)

(c) That it was agreed between said Morse and said defendants Sinai and Platt that the said defendants Sinai and Platt should inform Martina Maxine Dole and her then husband, the said defendant, Arthur A. Dole, that after purchasing said mining property for the use and benefit of said Martina Maxine Dole and paying to the receiver the sum of $2500 which had been sent by Martina Maxine Dole to said defendants Sinai and Platt for said purchase; that said defendants Sinai and Platt had been compelled to re-sell all of said mining property in order to obtain the money necessary to complete the payment of said sale price of said mining property and that for a time said defendants Sinai and Platt were fearful that they would not be able to make any sale of any of said mining property and that Martina Maxine Dole would lose her investment of $2500 and that said defendants

had been forced and compelled to sell the mining property in order to obtain from such sale the return of the original investment of $2500 plus a profit of $500 and said defendants Sinai and Platt so informed said Martina Maxine Dole. (Paragraph XVII of second amended complaint; Tr. 15-16.)

It is further alleged that when Morse entered into said contract with said defendants Sinai and Platt, both Morse and defendants Sinai and Platt had notice and knowledge that Sinai had made a bid for said mining property and had been the successful bidder as agent, trustee and attorney for said Martina Maxine Dole. (Paragraph XVIII of second amended complaint; Tr. 15-17.)

It is further alleged that defendant Sinai acquired said property and the sale was conferred to him by order of Court and by sufficient deed from said receiver. (Paragraph XIX of second amended complaint; Tr. 17.)

It is further alleged that after so acquiring said mining property said defendant Sinai conveyed the same to Sierra Consolidated Mines, Inc., a corporation, which is wholly controlled and dominated by said defendants Sinai, Platt and Morse with notice and knowledge that said mining property so sold, signed and transferred by said Sinai was the property of Martina Maxine Dole. (Paragraph XX of second amended complaint; Tr. 18-19.)

It is further alleged that said mining property is easily worth the sum of $3,000,000 and that since the acquisition by said defendant Sierra Consolidated

Mines, Inc., a corporation, of said property the said defendants Sinai and Platt have received dividends and attorneys fees and other moneys from said corporation in excess of $50,000 and that all property obtained by said defendants Sinai and Platt, including all stock of said corporation, all moneys received as attorneys fees or otherwise, were in reality received by said defendants Sinai and Platt and are now held by them as the agents, trustees and attorneys of said Martina Maxine Dole, deceased, and that by reason of the death of said Martina Maxine Dole and of the probate proceedings and of the heirship of said last named deceased all of the said last named property now held by said defendants Sinai and Platt is the property of the plaintiffs, to-wit: an undivided one-third interest thereof to Virginia Davis Hartman and Margaret Davis Richardson. (Paragraph XXI of second amended complaint; Tr. 19-20.)

It is next alleged that plaintiff, Virginia Davis Hartman, was during all the times mentioned in the said amended complaint a resident of the State of New York; that plaintiff, Margaret Davis Richardson, was during all the times mentioned in the second amended complaint resident of the State of New York; that said plaintiffs were not during any of the times mentioned in the second amended complaint residents of or residing either in California or Nevada and that all of the aforesaid facts and circumstances alleged in the second amended complaint were not known or discovered by said plaintiffs until the year 1938; that upon said discovery of said facts and circumstances

plaintiffs promptly caused said facts and circumstances to be investigated and did instruct and authorize the above entitled action to be commenced in their names and for and on their behalf. (Paragraph XXII of second amended complaint; Tr. 20-21.)

Then follow allegations as to the notification by the defendant Dole, the husband of said Martina Maxine Dole, of the death of said Martina Maxine Dole to the plaintiffs and a suggestion by said defendant Arthur A. Dole that he was employing as his attorneys C. F. Humphrey and Luther Elkins, of San Francisco, California, and suggesting that plaintiffs do likewise; that said defendant Arthur A. Dole entered into a written contract with the said attorneys and defendants, C. F. Humphrey and Luther Elkins, for and on behalf of himself and said plaintiffs to pay said attorneys and defendants a sum equal to one-half of any and all money recovered from said defendants Platt and Sinai for the fraud perpetrated by them as set forth in previous paragraphs of the second amended complaint; that said C. F. Humphrey and Luther Elkins were also the attorneys for the defendant Bank and that after many conferences between said attorneys acting both for defendant Dole and the defendant Bank concerning the said cause of action existing in favor of the heirs at law of the estate of said Martina Maxine Dole, deceased, as against defendants Sinai and Platt, it was agreed between the said last named defendant that said cause of action and compromise by the payment by said defendant Sinai to the said defendant Bank, special administra-

tor of the estate of Martina Maxine Dole, the sum of $5000. (Paragraphs XXIII, XXIV; Tr. 21-25 of second amended complaint.)

It is at this stage of the allegations of the second amended complaint that the defendant Bank, as special administrator, is directly accused of and became a party to the fraud perpetrated on the estate of Martina Maxine Dole, deceased, and her heirs at law including plaintiffs.

The second amended complaint then alleges that defendants Dole, Humphrey and Elkins, the attorneys both of defendant Dole and plaintiffs and the defendant Bank, upon being advised of the contemplated compromise by and between said defendant Sinai and said defendant Bank, as special administrator of the estate of Martina Maxine Dole etc. strenuously objected to the said contemplated compromise; that said defendant Bank, its officials and agents, did thereupon inform said defendants Humphrey and Elkins, that said defendants Humphrey and Elkins were acting as the attorneys of said defendant Bank, as special administrator of the estate of Martina Maxine Dole, deceased, and that said defendant Bank was not asking the opinion of its said defendant attorneys, Humphrey and Elkins, as to matters of policy, and if they, the said defendants, attorneys Humphrey and Elkins, were unwilling to present to the Probate Court in which said matters of the estate of Martina Maxine Dole, deceased, was then pending a petition for compromise as tentatively agreed, as aforesaid, that the said defendant Bank would procure the services of other attorneys

to represent it as special administrator in the matter of said estate of Martina Maxine Dole, deceased. (Paragraph XXV of second amended complaint; Tr. 25-26.)

It is further alleged that thereafter said defendant attorneys Humphrey and Elkins, of the defendant Bank, as special administrator of said estate of Martina Maxine Dole, prepared and filed and caused to be obtained by said defendant Bank as such special administrator the order of the Superior Court of the State of California in and for the County of San Mateo in the matter of the estate of Martina Maxine Dole, deceased, approving said compromise in the sum of $5000 from said defendant Sinai. (Paragraph XXVI of second amended complaint; Tr. 26-27.)

It is further alleged that in pursuance of said order of the Probate Court so obtained by said defendant Bank as special administrator of the estate of Martina Maxine Dole, deceased, approving said compromise between said Sinai and defendant Bank as administrator of said estate, the defendant Bank executed complete release and discharge in favor of said defendant Sinai concerning all claims and alleged indebtedness due by said defendant Sinai to the heirs at law, including plaintiffs, of Martina Maxine Dole, deceased. (See paragraph XXVII of second amended complaint; Tr. 27-28.)

Then follow allegations that said compromise and releases between defendant Sinai and defendant Bank as special administrator of the estate of Martina Maxine Dole, deceased, did not nor did the same pur-

port to release any cause of action existing in favor of the plaintiff against said defendant Sinai or said defendant Bank or any or all of the remaining defendants for the matters hereinbefore specifically set forth and hereinafter more specifically set forth and alleged. (See paragraph XXVIII of second amended complaint; Tr. 28-29.)

It is further alleged that defendant Sinai paid to said defendant Bank as special administrator of the estate of Martina Maxine Dole, deceased, said sum of $5000; that thereafter said Probate Court entered a decree of final distribution in the matter of the estate of Martina Maxine Dole, deceased, and by said decree ratified and approved the aforesaid compromise between said defendant Sinai and said defendant Bank, as special administrator of the estate of Martina Maxine Dole, deceased; that under and by virtue of said decree of final distribution the said attorneys of said defendant Bank, defendants Humphrey and Elkins received the sum of $2500 under and by virtue of the contract so entered into as aforesaid by and between said last named defendant and the defendant Dole as attorneys for the heirs at law of said Martina Maxine Dole, deceased, and the defendants, Humphrey and Elkins, did further receive a share in the remaining $2500 to the extent that said sum of $2500 increased the value of said estate of Martina Maxine Dole, deceased, pursuant to and by virtue of certain laws and statutes in the State of California providing for the payment of attorneys fees upon a fixed valuation of estates of deceased per-

sons. (See paragraph XXIX of second amended complaint; Tr. 29-30.)

It is next alleged that said order of said Probate Court, approving and authorizing the compromise of said alleged indebtedness due to the estate of Martina Maxine Dole, deceased, and the said heirs at law of said last named deceased person by the said defendant Bank, as special administrator of said estate, with the defendant Sinai and the releases and discharges obtained thereunder were and each of them was procured by a fraud of the various defendants herein acting in concert and motivated by the common design of procuring the aforesaid compromise, including said defendant Bank, said fraud being extrinsic in its nature and character, to-wit:

(a) That at the time the petition was filed by defendant Bank to settle and compromise the indebtedness owing by defendant Sinai to the estate of Martina Maxine Dole, deceased, and to her heirs at law, and for some time prior thereto and during all the times thereafter in the second amended complaint alleged, the First National Bank of Nevada, formerly the First National Bank of Reno, was a national banking institution, and that during all of said times the said defendant Sinai who was an officer and director of said institution and during all of said times said defendants Sinai and Platt were the attorneys for said First National Bank of Nevada and that during all of said times said First National Bank of Nevada, was owned, managed, operated and controlled by the Transamerica Corporation, which said last

named corporation also during all of said time was owned, managed, operated and controlled by the defendant Bank; that by reason of the aforesaid facts there existed during all of said times a fiduciary relationship between said defendants Platt and Sinai and said defendant Bank; that said relationship actuated and motivated said defendant Bank as special administrator of the estate of Martina Maxine Dole, deceased, to sanction and approve and likewise petition and request the Probate Court to approve and authorize the aforesaid compromise and likewise motivated and actuated said defendant Bank to execute the aforesaid release in favor of said defendant Sinai releasing and discharging him for all and any of the aforesaid indebtedness; that all of the aforesaid information was withheld from the Probate Court in the matter of the estate of Martina Maxine Dole, deceased, by said defendant Bank and by said defendants Humphrey and Elkins, attorneys for said defendant Bank as well as attorneys for defendant, Arthur A. Dole, and the plaintiffs as heirs at law of said Martina Maxine Dole, deceased, at the time that the said petition for leave to compromise said alleged indebtedness was heard and determined by the said last mentioned Court and at the time said Court made and caused to be entered a decree of final distribution which contained an order approving and settling the account of the said special administrator and approving the aforesaid compromise and release of the said indebtedness. (Paragraph XXXI of second amended complaint; Tr. 31-38.)

Note: Here we have an affirmative allegation of extrinsic fraud, to-wit: The suppression of information from the Probate Court of the intimate, fiduciary relations existing between the defendant Bank and defendant Sinai and the actions of the defendant Bank in proposing and approving of the compromise of $5000 by defendant Sinai to the estate of Martina Maxine Dole, deceased, and of the plaintiffs as her heirs, for his fraudulent conduct in acquiring the valuable mining property alleged to be worth $3,000,000; suppressing the fact from the Probate Court that the defendant Sinai was a director and occupied fiduciary relations with the defendant Bank in one of its branches in the State of Nevada and that defendants Sinai and Platt were the attorneys for said defendant Bank in Nevada, and although the defendant Bank as special administrator of the estate of Martina Maxine Dole, deceased, and of the plaintiffs as her heirs, owed the highest duty to see to it as such special administrator that they receive the best possible settlement for the fraud of defendant Sinai and a sum largely in excess of the $5000 compromise. If this does not constitute extrinsic fraud, what does?

Reverting to the allegations of the second amended complaint alleging extrinsic fraud we find

(b) It is alleged that shortly before the time set for the hearing of the petition for compromise the indebtedness owing by defendant Sinai, the defendant Dole consulted with defendants Humphrey and Elkins concerning the opposing the granting of said

petition for compromise; that the said defendant Dole informed defendants Humphrey and Elkins that he was opposed to the compromise as he did not consider it to the best interest of either the estate of Martina Maxine Dole, deceased, or her heirs (including plaintiff); that said defendant Dole was informed by said defendants Humphrey and Elkins that they agreed with him that the said compromise was not for the best interest of said heirs at law of said estate but that it was useless for him or anyone else to oppose the petition of said defendant Bank as special administrator, as the Court would not listen seriously to any of the heirs in opposition to the petition to compromise but on the contrary would grant the petition to compromise irrespective of any opposition on the part of said heirs; that the said defendants Humphrey and Elkins further advised defendant Dole that in their opinion the proposed compromise was illegal and would not be binding on the heirs of said Martina Maxine Dole, deceased, and in any event would not release any defendant other than the defendant Sinai; that defendants Humphrey and Elkins did further counsel and advise said defendant Dole not to appear before the Court at the hearing of said petition to compromise as he would accomplish nothing by so doing and that they, the defendants Humphrey and Elkins, would represent the heirs of said Martina Maxine Dole, deceased; that subsequent to the aforesaid conversation between defendants Humphrey and Elkins and the defendant Dole the defendants Humphrey and Elkins did prepare and furnish to the defendant Dole a written opin-

ion to the effect that said compromise was not binding on the heirs at law of said Martina Maxine Dole as far as the defendant Platt was concerned; that the defendant Dole relied upon the aforesaid advice of said defendants Humphrey and Elkins and as a result thereof did not appear before the said Probate Court. That for the reasons heretofore alleged the said defendant Dole did at the suggestion and upon the advice of said defendants Humphrey and Elkins sign and execute the aforesaid release, releasing and discharging said defendant Sinai from all claims concerning the said indebtedness as aforesaid. (Paragraph XXXI of second amended complaint; Tr. 35-37.)

Note: Here we have the two attorneys representing the defendant Bank as special administrators and also the heirs at law of said Martina Maxine Dole, deceased, suppressing from the Probate Court the fact that defendant Dole, as one of the heirs, opposed the settlement and compromise (of course, plaintiffs living in the East knew nothing of these machinations and fraud by the defendant Bank and their attorneys) and lulling said Dole into a fancied security by advising him that said settlement and compromise by said defendant Bank in the Probate Court would not hold in law and actually keeping him from appearing before the Probate Court at the hearings on the compromise so that he could not make known to the Court his objections to the inadequacy of the settlement as being a fraud on the rights of the heirs at law of said Martina Maxine Dole. If these

acts of the attorneys for the defendant Bank and of the Bank itself as special administrator in suppressing from the Probate Court the true state of facts relating to the compromise and in advising heir at law Dole not to appear in Court do not constitute clear cases of extrinsic fraud, then no case can be imagined which would?

Again reverting to the allegations of the second amended complaint alleging extrinsic fraud we find

(c) That defendants Humphrey and Elkins and said defendant Bank as special administrator, acting through its officers, agents and employees appeared at the hearings to compromise and for final distribution and failed and neglected to call to the attention of the Probate Court the true facts and circumstances of the transactions had by the said Martina Maxine Dole during her lifetime and said defendants Platt and Sinai; failed and neglected to call to the attention of the Probate Court that said Martina Maxine Dole died possessed of valuable rights in said mining property which rights by reason of her death had become vested in her heirs at law; that said defendants Humphreys and Elkins as the attorneys for said defendant Bank as such special administrator, and said defendant Bank failed and neglected to explain to said Probate Court the relationship existing between said defendants Platt and Sinai and said defendant Bank, and the relationship existing between the defendants Humphrey and Elkins and the heirs at law of said Martina Maxine Dole, and the reasons that actuated the defendant Bank, as special

administrator, in effecting said compromise in behalf of said defendant Sinai, one of the directors of their branch Banks and their attorneys in Nevada, and the fact that defendant Dole had been counselled and advised not to appear before the Probate Court by the defendants Humphrey and Elkins, the attorneys for the defendant Bank as special administrator. (Paragraph XXXI of second amended complaint; Tr. 37-39.)

(d) That said defendants Humphrey and Elkins, as the attorneys for said defendant Bank as such administrator, and said defendant Bank, appeared before the Probate Court and petitioned for and obtained leave to compromise as above stated and represented to said Probate Court that it was for the best interest of said estate of said Martina Maxine Dole, deceased, and the heirs at law of said last named person, that said alleged indebtedness be compromised and that the said Probate Court approved the same. That said representations to said Probate Court by said last named defendants, including the defendant Bank, as special administrator, that said compromise was for the best interest of the heirs at law of said Martina Maxine Dole were wilfully and fraudulently made by said defendants for the purpose of misleading the Probate Court and obtaining from said Probate Court the requested authorization to compromise said alleged indebtedness. That said mining property belonging to said estate and the said heirs including plaintiffs, then in the possession of said defendants Platt and Sinai as aforesaid was

worth many times more than the amount secured by the said defendant Bank in compromise of said indebtedness, all of which said defendant Bank and said defendant Sinai well knew and that said petition for compromise was filed and said representations made to said Probate Court for the sole and only purpose of procuring a release in favor of said defendant John Sinai. That said defendant Bank and said defendant Sinai fraudulently withheld and concealed from the Court the true nature of said indebtedness, of the value of said indebtedness, or of the property then held by said defendant Sinai belonging to the estate of Martina Maxine Dole, deceased, and said heirs of said last named person, all of which was then well known to said defendants and that said withholding and concealment was made by said last named defendants for the sole and only purpose of securing said orders approving said compromise and the said decree settling said account of said special administrator, the defendant Bank, and decreeing distribution as aforesaid. (Paragraph XXXI of second amended complaint; Tr. 39-41.)

(e) That said defendants Humphrey and Elkins as attorneys for defendant Bank as special administrator and said defendant Bank as said special administrator of said estate, failed to inventory in the said estate of said Martina Maxine Dole, deceased, either the said real property acquired by the said Martina Maxine Dole, deceased, during her lifetime by reason of the transaction had by her with the defendants Platt and Sinai as aforesaid, or the actual

amount of the alleged indebtedness due from the last named defendants to the estate of said Martina Maxine Dole, deceased, and to the heirs at law of the said last named deceased person. (Paragraph XXXI of second amended complaint; Tr. 41.)

It is further alleged that all the facts and circumstances set forth in paragraph XXXII (paragraph XXXI of said second amended complaint) had a material bearing on the question and issue as to whether or no the proposed and suggested compromise of the alleged indebtedness due from defendant Sinai to the said estate of Martina Maxine Dole and to the heirs of said last named deceased person was for the best interest of said estate and of the said heirs at law including plaintiffs. (See paragraph XXXIII of second amended answer; Tr. 42.)

It is next alleged that the facts constituting the fraud committed by the defendant Bank and said defendant Sinai were not known to said plaintiffs at the time of the filing of the original complaint, and that said plaintiffs were placed upon investigation of said facts and circumstances by reason of certain recitals contained in the answer of said defendant Sinai, including the exhibits attached thereto and that as a result of said investigation all of the aforesaid facts together with the other facts and circumstances alleged in paragraph XXXII (XXXI of this second amended complaint) were discovered by the plaintiffs approximately on or about the 28th day of January, 1939, about the time that the said answer was filed as aforesaid. (See paragraph XXXIV of second amended complaint; Tr. 42-43.)

There is an allegation that defendants Davis and Dole are joined as party defendants for the reason that the consent of said defendants could not be obtained; that by reason of the provisions of Section 382 of the Code of Civil Procedure of the State of California, the said defendants Davis and Dole are named as party defendants. (See paragraph XXXV of second amended complaint; Tr. 43.)

Finally, it is alleged that said heirs at law have been damaged in the sum of $3,000,000, no part of which has been paid, of which said sum the plaintiffs as heirs at law of the said Martina Maxine Dole, deceased, are entitled to $1,000,000. (See paragraph XXXVI of second amended complaint; Tr. 43.)

It is difficult to conceive of a stronger case of extrinsic fraud, as disclosed by the allegations of the second amended complaint, against the defendant Bank. It owed, as special administrator of the estate of Martina Maxine Dole, deceased, the highest duty of trust and loyalty to the estate and to the heirs thereof. Instead of being faithful to its high trust and duty, it deliberately connived and conspired to defraud the estate and heirs by its machinations in favor of defendant Sinai, its attorney and fellow director of one of its banks in Nevada and obtained a compromise in favor of defendant Sinai in the paltry sum of $5,000 of a claim worth many times that amount by suppressing from the Probate Court the true state of facts and deliberately misrepresenting the true situation to the Probate Court and preventing, through its own attorneys, defendants Humphrey and Elkins, the appearance of defendant Dole, one of

the heirs at law, from appearing in Court before the Probate Court to voice and testify as to his objections to the proposed compromise and his reasons therefor.

Before entering into further argument in support of our contention that the second amended complaint strongly and convincingly sets out a case of extrinsic fraud against the defendant Bank, we will refer to a few elementary propositions, which were apparently ignored by the Judge of the Court below.

In the first place the motion to dismiss is, in law, the equivalent of a demurrer.

Equity Rule 29 (U. S. Supreme Court Rules).

A demurrer admits the truth of all matters well pleaded and all the reasonable inferences to be drawn therefrom.

Vol. 5 Ency. of U. S. Sup. Ct. Rep. 309 and many cases cited.

An examination of the points and authorities submitted by counsel for the defendant bank in the Court below disclosed that there was only really one point urged by them in support of their motion to dismiss said action, namely that the order confirming the so-called compromise and the order settling the account of the defendant bank as the administrator of the estate of Martina Maxine Dole in the probate proceedings previously pending in the Superior Court of the State of California, in and for the County of San Mateo, are *res adjudicata* of the facts alleged in plaintiffs' second amended complaint. In this respect, counsel for defendant bank contends that the facts

relied upon by the plaintiffs as constituting fraud are intrinsic in their character.

Counsel for defendant Bank, in the Court below, relied for the most part, in their argument that the facts as thus pleaded in the second amended complaint constitute intrinsic as distinguished from extrinsic fraud, upon the cases of *Carr v. Bank of America,* 11 Cal. (2d) 366; *Perna v. Bank of America,* 28 Cal. App. (2d) 372; *Ruinwalt v. Bank of America,* 3 Cal. (2d) 680, and *McLaughlin v. Security First National Bank,* 20 Cal. App. (2d) 602.

We assume that they will again rely on these same authorities on this appeal.

It is interesting to note that of the four cases principally relied upon by counsel for defendant Bank, three present facts charging the defendant Bank in the instant proceeding with fraudulent and negligent conduct. These cases are, however, easily distinguishable from the instant proceeding in that an examination of the facts recited in the opinions of the foregoing cases reveal that at least the Bank called to the attention of the Probate Court at the time of procuring the orders relied upon, all facts actually constituting what was subsequently charged as fraudulent conduct. It follows that if the facts were before the Court said fraud would of necessity be intrinsic as distinguished from extrinsic. It would seem from an examination of the aforesaid facts that the chief complaint was that certain information was withheld from the Court by way of explanation of conditions

that motivated and actuated the defendant Bank in its effort to procure the sanction of the Probate Court in and about the matters therein complained of.

All of these cases involved facts entirely different from the issues presented in the instant proceeding. In every one of these cases the Court had actual knowledge of all of the investments made by the defendant Bank as executor or trustee. The statements made to the Court might have been false, assuming that the charges contained in the subsequent complaints attacking the orders were true. But these statements and facts were not in issue. To exemplify the distinction thus presented we will quote briefly from the opinion in the *McLaughlin* case, supra:

> "In approving the acts of the trustee in making the investments it had reported, the Probate Court necessarily had open before it the question of the legality of the investments and the matter of their economic merit as well. The approval of these investments, requested by the trustees, presented for determination at least these two issues. The false representations and lack of complete revealment on these issues, therefore, went to the merits of the cause submitted for judgment. They constituted intrinsic not extrinsic fraud."

The amended complaint in the instant proceedings consists of two counts. In the first count it is alleged in effect that the defendants Samuel Platt and John S. Sinai were attorneys for Martina Maxine Dole during her lifetime and that they acted for her as her attorneys, trustees, and agents in and about the pur-

chase of valuable mining property; that they bought said property in the name of the defendant Sinai and pursued a course of fraudulent conduct tending to deceive the said Martina Maxine Dole as to the true nature of the investments and to their own benefit and profit procured said property to the detriment of their client. In the second cause of action many of the allegations contained in the first cause of action are made a part of the second cause of action by way of reference and by said references are incorporated as a part and portion of said second cause of action. In the said second cause of action it is further alleged that the said Samuel Platt and John S. Sinai were likewise the attorneys and directors for a bank in Reno which was owned, operated, managed and controlled by the Transamerica Corporation and which in turn operated, managed, owned and controlled the defendant Bank.

It is of course elementary and well established that an administrator is the agent for the heirs of a deceased person.

The pleading as thus presented, therefore, establishes a fiduciary relationship existing between the defendants Samuel Platt and John S. Sinai with the aforesaid Martina Maxine Dole during her lifetime, a fiduciary relationship existing between the said Samuel Platt and John S. Sinai and the defendant Bank at the time that the defendant Bank acted as the administrator of the estate of the said Martina Maxine Dole and procured the orders from the Probate Court which are now relied upon as constituting

a bar to the instant proceeding, and a fiduciary relationship existing between the defendant Bank and the plaintiffs, Virginia Davis Hartman and Margaret Davis Richardson as heirs at law of the said Martina Maxine Dole by reason of the fact that said defendant Bank was at the time of the procuring of the aforesaid orders from said Probate Court acting as the administrator of the estate of the said Martina Maxine Dole, as aforesaid.

We believe this contention to be self evident as it is of course exceedingly elementary that the relationship of attorney and client is of the highest fiduciary character.

Clark v. Millsap, 197 Cal. 765;
Metropolis Trust & Savings Bank v. Monnier, 169 Cal. 592, on page 598.

It is also elementary that the relationship existing between the administrator and heirs is of the highest fiduciary character.

In the case of *Hewitt v. Hewitt* (9th C.C.A., 1927), 17 F. (2d) 716, the Court in discussing this question say:

> "No doubt, where litigants are dealing at arm's length, they are under no obligation to disclose to their adversaries the weakness of their cause of action or defense, but this rule has little or no application *where a fiduciary relation exists between the parties, and that such relationship does exist between an administratrix and the heirs of the estate is well settled.* Dismond v. Connolly (1918; C.C.A. 9th), 251 F. 234 (writ of certiorari denied in (1918) 248 U.S. 561, 63 L. ed. 422, 39

S. Ct. 7) same case (1921; C.C.A. 9th), 276 F. 87 (writ of certiorari denied in (1921) 257 U.S. 656, 66 L. ed. 420, 42 S. Ct. 169)." (Italics ours.)

Under the laws of the State of California it is well settled that a person in a fiduciary capacity may not take part in any transaction in which he or any one for whom he acts as agent has an interest, present or contingent, adverse to that of his beneficiary. Section 2230 *Civil Code* of the State of California.

The Civil Code further provides that a violation of the provisions on trust is a fraud against the beneficiary. Section 2234 *Civil Code* of the State of California.

It must of necessity follow that the only rational conclusion that can be drawn from what has been said so far is that the relationship of an attorney at law and his clients and the relationship of an administrator and the heirs of an estate are fiduciary, to-wit, a trust relationship, and that the rules applicable to trustees are applicable to attorneys and administrators, and that therefore any breach of a fiduciary relationship is a fraud against the client or heirs respectively representing the beneficial interests that any such attorney, administrator or executor represents in their representative and fiduciary capacity.

To judge if such a fraud is extrinsic or intrinsic we must consider if the relationship of the defendant Bank and the defendant Sinai and Pratt was an issue raised before the Probate Court in which the aforesaid orders, now relied upon, were procured.

If the matters constituting the collusion and fraud as presented in the instant proceeding were not an issue and were not presented to the Probate Court in procuring the aforesaid orders, the same could not by any possible stretch of the imagination be intrinsic and would of necessity have to be extrinsic in their character.

That such matters were not presented to the Probate Court at the time of the procuring of the aforesaid orders appears specifically from the matters pleaded in the second count of the amended complaint in the instant proceeding, and were fraudulently suppressed, which affirmatively alleges as follows:

> "That in addition to the making of the aforesaid representations the said defendant Bank of America National Trust & Savings Association, a banking association, and the said defendant John S. Sinai, *fraudulently withheld and concealed from said Court at the time of procuring of said order and at the time of the entering of said decree settling said account and ordering final distribution, many facts material and pertinent to the question of whether or no said compromise should be effected, to-wit that said last named defendants did not inform said Court of the true nature of said indebtedness, of the value of said indebtedness, or of the property then held by said defendant John S. Sinai belong to the said estate of Martina Maxine Dole, deceased and the said heirs of said last named persons, as aforesaid, all of which was then well known to the said defendants, and that said withholding and concealment was made by said last named defendants for the sole and only purpose of procuring*

> *said orders approving said compromise and the said decree settling said account of said administrator and decreeing distribution, as aforesaid."* (Tr. 40-44.)

It will be noticed that in the foregoing quoted portion of the second amended complaint the word "indebtedness" is used. Possibly it would have been better to have used the word "alleged" before the word "indebtedness" for the reason that said word "indebtedness" is used advisedly. In this connection the allegations contained in the first count and separate cause of action must be read and it appears from said allegations that there was in reality no indebtedness existing between said estate of Dole and the said defendants Sinai and Platt but that the claim of said estate of Dole was that the said defendants Sinai and Platt were holding property in trust for the benefit of the deceased and after her death became the trustees for her heirs at law. The term "indebtedness" was used because of the fact that in procuring the orders from the Probate Court the said controversy then existing between the estate of Dole and the said defendants Platt and Sinai was improperly treated as an indebtedness.

It is of course well settled and elementary that property, both held in trust and otherwise, vests *eo instanti* upon the death of a deceased person in the heirs of the decedent, and that the only purpose of probate is two-fold, namely to pay debts of the deceased, including expenses of administration, and secondly, to determine heirship. Conceding that the

facts alleged in the second amended complaint in the instant proceeding are true, all of the interests of Martina Maxine Dole in the property alleged to have been held in trust by the defendants Platt and Sinai vested in the heirs at law immediately upon the death of Mrs. Dole, including the plaintiffs Virginia Davis Hartman and Margaret Davis Richardson. It is hard, indeed, to understand how the orders relied upon, even conceding for the moment that the defense of intrinsic fraud has some merit to it, which of course we do not concede, would constitute a bar for the reason that under the probate laws of this state only an indebtedness can be compromised. No Probate Court, which is a court of limited jurisdiction, has the right to deprive or divest the title of real property vested by operation of law in the heirs of a deceased person. We submit this point, by way of passing, as it must be obvious that in any event the grounds set forth in the motion to dismiss must of necessity be insufficient upon which to predicate any such order.

Before further considering the argument of counsel for defendant Bank to the effect that the facts as alleged in the complaint merely constitute intrinsic fraud, we notice that the case of *Pico v. Cohn,* 91 Cal. 129, is cited to the Court in support of the aforesaid contention. An examination of this case reveals that it presented an issue of bribery of witnesses and necessary perjury resulting therefrom. We have no quarrel with the rule of law that perjured testimony constitutes at most intrinsic fraud. Indeed it could

not be otherwise if there is to be any finality to litigation, for obviously in most every case someone has told the truth and others an untruth. The testimony presented at any trial can never be reconciled —that is the very purpose for which Courts are organized and constituted, namely to determine the truth and credibility of testimony presented by various witnesses. If the law permitted the integrity and honesty of witnesses to be the basis of either a direct or a collateral attack upon judgments, there would of necessity be no end to litigation. Just what applicability this elementary rule has to the present proceeding we must, of necessity, plead our lack of understanding.

A further examination of all of the cases cited by counsel for defendant Bank reveals that the Court itself makes clear the distinction between intrinsic and extrinsic fraud, and in most of the opinions the Court points out that if the facts constitute extrinsic, as distinguished from intrinsic fraud, any orders of a probate Court would not constitute a bar to the proceeding and would not be *res adjudicata.*

As stated before, the main issue before this Honorable Court is that the relationship existing between the respective parties as aforesaid was not called to the attention of the Probate Court. Nothing on the face of the probate proceedings could indicate the collusion of all of these parties and the abuse of the estate imposed in them while acting in a fiduciary relationship and that therefore the heirs had no rea-

son to raise the issue and the Probate Court had no reason to determine any such issue of collusion, fraud and negligence. We quote from the learned author of California Jurisprudence:

> "Collusion may constitute extrinsic fraud, as where an administrator and his attorney collusively procured a sale of estate realty for the latter's benefit and to the detriment of the persons represented by them, and there was nothing on the face of the proceedings to indicate the collusion and no opportunity to determine any issue of fraud in the probate court. So collusion between the plaintiff and one defendant whereby a previous partial payment by the latter is fraudulently concealed from his codefendant is a ground for equitable relief."
>
> 15 *Cal. Juris.* p. 21.

In the case of *Bergin v. Haight,* 99 Cal. 52, the Court at page 55 of the opinion say:

> "It is claimed by appellant that this is a collateral attack upon the orders of the probate court, and since the records of the proceedings shows that the court had acquired jurisdiction, and that the proceedings were upon their face regular, the order confirming the sale cannot be thus attacked.
>
> "It is true, the court did acquire jurisdiction to administer upon the estate, and to order and confirm the sale of the property; but it does not follow therefrom that this is a collateral attack. The attack is a direct attack upon the sale, on the ground of fraud, and as such is authorized by law. (Van Fleet's Collateral Attack, pp. 4, 5, 15,

and authorities cited.) It is not every species of fraud, however, which may be the basis of an action to vacate an order or judgment. *To be actionable, as stated by our chief justice in Pico v. Cohn,* 91 Cal. 129, 25 Am. St. Rep. 159, *it must be 'a fraud extrinsic or collateral to the questions examined and determined in the action * * * Among the instances given in the books are such as these: Keeping the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit; or, where an attorney fraudulently pretends to represent a party, and connives at his defeat, or being regularly employed, corruptly sells out his client'. The fraud herein relied upon falls within the principle illustrated by the example stated above, and certainly within the principle underlying many other cases.* (*Jones v. Hanna,* 81 Cal. 507; *Johnson v. Waters,* 111 U. S. 667; *Griffith v. Godey,* 113 U. S. 93; *Mayberry v. McClurg,* 51 Mo. 256; *Hardy v. Broaddus,* 35 Tex. 668; *Warner v. Blakeman,* 4 Keyes 487; *La Rue v. Friedman,* 49 Cal. 278; *Caldwell v. Caldwell,* 45 Ohio St. 513.) *The plaintiff had only constructive notice of the administration and proceedings to sell. Furthermore, there is nothing upon the face of the proceedings to indicate a fraudulent collusion between the administrator and his attorney. There was no opportunity to determine an issue of fraud in the probate court. The administrator was acting as trustee and agent for the owners of the property, whether such owners were heirs or assignee of heirs, and the defendant stood in the same confidential relation.* (*Ex parte James,* 8 Ves. 343; *O'Dell v. Rogers,* 44 Wis. 136-178; *West v. Waddill,* 33

Ark. 586; *Phillips v. Benson,* 82 Ala. 500; *Hawley v. Cramer,* 4 Cowen 718-733; *Bakers v. Humphrey,* 101 U. S. 494."

It is interesting to note, in that portion of the opinion of *Bergin v. Haight,* supra, above quoted, that the Court points out that the heirs at law could of necessity only at most have had constructive notice of the proceedings and that the said fraud and collusion did not appear upon the face of said proceedings. This is particularly true in the instant proceedings for it appears from the facts recited and alleged in the second amended complaint that both the plaintiffs were residents of the State of New York and no contention or claim is made that either of said plaintiffs ever had actual notice of the presentation of the compromise to the Probate Court nor that any of the acts now complained of appear upon the face of the probate proceedings. On the contrary it appears from the allegations of the second amended complaint in the instant proceedings that the first actual notice that the plaintiffs had that the Probate Court had attempted to authorize any compromise of their property rights was when an answer was filed by the defendant Sinai in the instant proceeding, whereupon the plaintiffs within seasonable time amended their complaint setting forth the fraud now relied upon in procuring not alone the so-called order authorizing the said compromise of the alleged indebtedness but likewise the order confirming and approving the defendant Bank's account as administrator and decree of distribution. (Tr. 42-43.)

In *Curtis v. Schell,* 129 Cal. 208, at page 217, the Court cites with approval the case of *Johnson v. Waters,* 111 U. S. 640, using the following language:

> "Johnson v. Waters, 111 U. S. 640, was an original suit in the circuit court of the United States for the district of Louisiana, brought for the purpose of setting aside fraudulent and void sales made by a testamentary executor under the orders of the probate court in said state. In that case it was contended that the plaintiff was concluded by the proceedings in the probate court, which was alleged to have exclusive jurisdiction of the subject matter, and that its decision was conclusive against the world, especially against the plaintiff, who was a party to the proceedings. The supreme court of the United States in its opinion, conceding that the administration of the estate there in question properly belonged to the probate court, and that, in a general sense, the decisions of that court were conclusive and binding, especially upon parties, said: '*But this is not universally true. The most solemn transactions and judgments may, at the instance of the parties, be set aside or rendered inoperative for fraud. The fact of being a party does not estop a person from obtaining in a court of equity relief against fraud. It is generally parties that are the victims of fraud. The court by chancery is always open to hear complaints against it, whether committed in pais or by means of judicial proceedings. In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceedings in another court; but it will scrutinize the conduct of the parties, and, if it finds that they have been guilty of fraud in obtaining a judgment or*

decree, it will deprive them of the benefit of it and of any inequitable advantage which they have derived under it'. (Citing a large number of cases.)

"Arrowsmith v. Gleason, 129 U. S. 86, presented the question as to the jurisdiction of a probate court to make a sale of the lands there in controversy, and confirm sales reported by the guardian in said proceeding in probate. It was claimed there, as here, that the party complaining was bound by the judgment and orders of the probate court. The supreme court of the United States, however, says in its opinion: 'But it is insisted that the circuit court of the United States, sitting in Ohio, is without jurisdiction to make such a decree as is specifically prayed for, namely, a decree setting aside and vacating the orders of the probate court of Defiance county. If by this is meant only that the circuit court cannot by its orders act directly upon the probate court, or that the circuit court cannot compel or require the probate court to set aside or vacate its orders, the position of the defendants could not be disputed. *But it does not follow that the right of Harmening, in his lifetime or of his heirs since his death, to hold these lands, as against the plaintiff, cannot be questioned in a court of general equitable jurisdiction on the ground of fraud. If the case made by the bill is clearly established by proof, it may be assumed that some state court, of superior jurisdiction and equity powers and having before it all the parties interested, might afford the plaintiff relief of a substantial character. But, whether that be so or not, it is difficult to perceive*

why the circuit court is not bound to give relief according to the recognized rules of equity as administered in the courts of the United States'."

In *Ocean Ins. Co. v. Fields,* 2 Story 59, Federal Case No. 10406, the Court overruled a demurrer to a bill in equity to set aside a judgment obtained by fraud. The case involved a suit on an insurance policy in which the Court held that the wilful concealment of the fact of the original fraud upon the action to recover the insurance on a lost boat was based upon sufficient facts to warrant the aid of equity since the fact of the original fraud if known to the defendant would have been a complete answer to the success of the suit. This case is cited with approval in *O'Brien v. Markham,* 17 F. Supp. 633, decided in the United States District Court of the Southern District of California, Central Division, where the plaintiff had been prevented from contesting a will, due to a conspiracy. The decision was adverse to the plaintiff because of the fact that not all of the parties were before the Court. However, the Court points out in the opinion that the conspiracy of the parties preventing the plaintiff from contesting the will would be a sufficient fraud to set aside the probate of such instrument.

A lengthy discussion of this question and a summary of the California law is set forth in a comment in 23 *Cal. Law Review,* page 79. The early case of *U. S. v. Throckmorton,* 98 U. S. 61, 25 L. Ed. 93, is discussed. There the Court points out clearly that where a fiduciary relationship is relied upon that the

facts constituting the fraud are extrinsic in their character, using the following language:

> "But there is an admitted exception to this general rule, in cases where, by reason of something done by the successful party to a suit, there was, in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and *connives at his defeat; or where the attorney regularly employed* corruptly sells out his client's interest to the other side—these and similar cases which show that there never has been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree and open the case for a new and fair hearing." (Italics ours.)

The same line of reasoning is well recognized in California. See:

Sohler v. Sohler, 135 Cal. 323;
Simonton v. L. A. Trust & Savings Bank, 192 Cal. 651.

The rule is also recognized as applicable to a conspiracy to procure a sale on fraudulent claims.

Larne v. Friedman, 49 Cal. 278;
Bergin v. Haight, supra.

In the leading case of *Campbell-Kawannanakoa v. Campbell,* 152 Cal. 201, the Court says:

"The fraud here alleged, however, was extrinsic or collateral within the meaning of the rule. We are not confronted with a case where a party was in a former proceeding simply deprived by some fraudulent artifice or breach of fiduciary duty on the part of the prevailing party of his opportunity to be heard upon the issues there presented and determined, which is perhaps the most common instance of what is held to be extrinsic fraud. (See Bacon v. Bacon, 150 Cal. 577, (89 Pac. 317); Sohler v. Sohler, 135 Cal. 323, (87 Am. St. Rep. 98, 67 Pac. 282); Aldrick v. Barton, 138 Cal. 220, (94 Am. St. Rep. 43, 71 Pac. 169). The extrinsic character of the fraud is even clearer here than in such a case. The complaint is that the former proceedings were wholly sham, a mere fraudulent contrivance designed solely to give the appearance of legality and protection against attack to what was in fact nothing but the taking of plaintiffs' property without consideration and without any authority of law, and that they were carried through by means of false representation to and concealments from the court as to the real facts and purposes of the transaction. *Such an imposition upon the jurisdiction* of the court, to the injury *of the absent property owners,* from whom the nature of the *transaction was concealed* and who were wholly in ignorance thereof and could not have learned concerning the same from anything appearing on the face of the purported proceedings, by one who was their trustee for the proper administration of the affairs of the estate and the preservation of the

> property for legal distribution (Bergin v. Haight, 99 Cal. 52, (33 Pac. 760) and who was, moreover, as the natural guardian of two of the owners, under obligation to protect their rights, (Sohler v. Sohler, 135 Cal. 323, (87 Am. St. Rep. 98, 67 Pac. 282) clearly constituted under the authorities what is known as extrinsic fraud warranting equitable relief. (See Bergin v. Haight, 99 Cal. 52, (33 Pac. 760); Tillman v. Thomas, 87 Ala. 524, (13 Am. St. Rep. 42, 6 South. 151); Fisher v. Wood, 65 Tex. 199; McCampbell v. Durst, 73 Tex. 410, (11 S.W. 380); Lawson v. Acton, 57 N. J. Eq. 107, (40 Atl. 584); Hoffman v. Wheelock, 62 Wis. 436, (22 N.W. 713, 716); Arrowsmith v. Gleason, 129 U.S. 86, 9 (Sup. Ct. 237); Wickersham v. Comerford, 96 Cal. 433, (31 Pac. 358); Curtis v. Schell, 129 Cal. 208, (79 Am. St. Rep. 107, 61 Pac. 951); Anderson v. Bank of Lassen County, 140 Cal. 695, (74 Pac. 287); see, also, Sohler v. Sohler, 135 Cal. 323, (87 Am. St. Rep. 98, 67 Pac. 282); Aldrich v. Barton, 138 Cal. 220, (94 Am. St. Rep. 43, 71 Pac. 169.)"

The *Campbell* case has certain aspects exceedingly similar to the case at bar. There, the plaintiffs were non-residents as in the case at bar. There, it was decided they could not have learned from any notice that might have been given of a constructive character what the real purpose of the proceeding was. In the instant proceeding, because of the collusion of the parties involved the filing of the petition was just a sham, a mere fraudulent connivance designed solely to give appearance of legality, as in the *Campbell* case, supra.

In *Caldwell v. Taylor,* 218 Cal. 417, a general review of the law applicable is found. There again the Court points out that the fraud practiced on a party must be one which prevents a party from presenting all of his case to the Court.

Ocean Ins. Co. v. Fields, supra.

Again we call to the attention of the Court, as was said in the *Caldwell* case supra, that the plaintiffs were prevented from contesting any petition on behalf of the defendant bank within the period fixed by law, because of false statements made and vital information withheld as set forth and alleged in the second amended complaint. The plaintiffs had a right to rely upon the integrity of the defendant bank in its fiduciary position as an administrator, and by the filing of the petition seeking to compromise the defendant bank lulled the plaintiffs into security. Subsection 3, Sec. 1572, Civil Code, State of California; Subsection 1, Section 1573 Civil Code, State of California.

Also, in the case of *The Anglo California National Bank v. Kelly,* 117 Cal. App. 692 at page 694 of the opinion the Court says:

> " 'Equity will relieve an injured party from the effect of a judgment procured by extrinsic fraud, mistake or inexcusable neglect which were not the result of negligence or laches on the part of the complainant. (Sohler v. Sohler, 135 Cal. 323 (87 Am. St. Rep. 98, 67 Pac. 282); Bacon v. Bacon, 150 Cal. 323 (89 Pac. 317); Simonton v. Los Angeles T. & S. Bank, 192 Cal. 651, 656, (221 Pac. 368); Estate of Ross, 180 Cal. 651, 658 (182

Pac. 752); Clavey v. Loney, 80 Cal. App. 20 (251 Pac. 232).' (Jeffords v. Young, 98 Cal. App. 400, 404 (277 Pac. 163, 165).) 'It is elementary that the courts of this state may in an equitable proceeding inquire whether a judgment valid on its face was obtained by fraud. Sometimes such judgments may be set aside, but even in cases where this relief cannot be had a court of equity may "*prevent an inequitable* advantage being taken of it (the judgment) by adjudging the guilty beneficiary or his successor with notice a trustee for the defrauded party." Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, 208 (92 Pac. 184, 187); Estate of Walker, 160 Cal. 547 (36 L.R.A. (N.S.) 89, 117 Pac. 510).' (Title Inst. etc. Co. v. California Dev. Co., 171 Cal. 173, 208 (152 Pac. 542, 557).)"

See also

Estate of Ross, 180 Cal. 651.

In *Lamm v. Kipp,* 145 N. W. 183, it was held that where a person, who because of a fiduciary relation to another, owed a duty to make a full disclosure of all matters pertaining to the trust, neglected to do so knowing that his failure to make such disclosure would result in another's injury, and persisted in such silence throughout judicial proceedings, to the prejudice of the other and the advantage to himself, was guilty of extrinsic fraud as regarded the jurisdiction of equity to relieve against a judgment rendered in such proceeding.

See also the case of

Zaremba v. Woods, 17 Cal. App. (2d) 309.

From what has been said it must obviously follow:

1. That the fraud and collusion as alleged in the second amended complaint in the instant proceeding, was not an issue in the probate proceedings, being collateral and *extrinsic* to it;

2. That even if it was not collateral, it was *extrinsic,* because the heirs, due to the fiduciary relationship of the parties, were prevented from having their cases presented in Court.

Counsel for defendant Bank, during the argument in the Court below, insisted time and again, and in fact the entire premise of his argument was predicated upon the assertion that the only issue before the Probate Court was whether or not it was for the best interests of the heirs of the estate that the requested compromise be authorized, and that any fraud with reference to said issue would be intrinsic as distinguished from extrinsic. In making this argument counsel entirely overlooks the elementary and well established principle that the basis of the fraud now charged was not called to the attention of the Court, did not appear upon the face of the petition for the compromise, was unknown to the plaintiffs, being matters peculiarly within the knowledge of the defendants. and that said defendants fraudulently and negligently withheld said facts not alone from the plaintiffs but also from the Court. They now seek to take advantage of their own fraudulent and negligent conduct, which it is submitted they cannot do in a Court of equity.

We respectfully submit that the order of the lower Court granting the motion to dismiss said proceedings as to the defendant Bank of America National Trust & Savings Association, was erroneous and said motion to dismiss should have been denied and the Honorable Court should reverse said order with instructions to the lower Court to deny said motion to dismiss.

Dated, San Francisco,
March 27, 1942.

Respectfully submitted,
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Attorneys for Appellants.